

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
InPhonic, Inc.)	File No. EB-05-IH-0158
)	
)	NAL/Acct. No. 200532080139
)	
)	FRN No. 0012-5999-16

**ORDER OF FORFEITURE AND FURTHER NOTICE
OF APPARENT LIABILITY FOR FORFEITURE**

Adopted: April 18, 2007**Released: May 3, 2007**

By the Commission:

I. INTRODUCTION

1. In this *Order of Forfeiture and Further Notice of Apparent Liability for Forfeiture*, we both impose a forfeiture of \$819,905 (“*Order of Forfeiture*”), and propose a new forfeiture of \$100,000 (“*Further Notice of Apparent Liability*”), against InPhonic, Inc. (“InPhonic”). The *Order of Forfeiture* follows a Notice of Apparent Liability we issued on July 25, 2005.¹ Herein we find that InPhonic willfully and repeatedly violated: (1) section 64.1195 of the Commission’s rules² by failing to register with the Commission until January 2005; (2) sections 54.706(a) and 64.604(c)(5)(iii)(B) of the rules³ by failing to submit certain Telecommunications Reporting Worksheets (“Worksheets”) from 2002 to 2004; (3) section 254(d) of the Communications Act of 1934, as amended (the “Act”),⁴ and 54.711(a) of the rules⁵ by failing to contribute to the Universal Service Fund (“USF”); and (4) section 64.604(c)(5)(iii)(A) of the rules⁶ by failing to contribute to the Telecommunications Relay Service (“TRS”) Fund. The *Further Notice of Apparent Liability for Forfeiture* finds that InPhonic apparently is in violation of section 214(a) of the Act,⁷ and section 63.18 of the Commission’s rules,⁸ by failing to apply for and obtain authorization to provide international telecommunications service.

¹ *InPhonic, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 20 FCC Rcd. 13277 (2005) (“*InPhonic NAL*” or “*NAL*”).

² 47 C.F.R. § 64.1195.

³ *Id.* at §§ 54.706(a), 64.604(c)(5)(iii)(B).

⁴ 47 U.S.C. § 254(d).

⁵ 47 C.F.R. § 54.711(a).

⁶ *Id.* at § 64.604(c)(5)(iii)(A).

⁷ 47 U.S.C. § 214(a).

⁸ 47 C.F.R. § 63.18.

2. InPhonic's failures to pay its Congressionally-mandated USF and TRS Fund contributions strike at the core of the Commission's mission to promote access to affordable, quality telecommunications services for all Americans. As such, they are especially serious. In section 254 of the Act, Congress codified the historical commitment to universal service for consumers in all regions of the nation. In section 225 of the Act, Congress directed the Commission to ensure the availability of TRS to hearing- and speech-impaired individuals.⁹ Both programs are supported by mandatory contributions from telecommunications carriers providing interstate telecommunications services.¹⁰ The Commission also requires certain providers of interstate telecommunications, including interconnected Voice over Internet Protocol (VoIP), to contribute to the USF.¹¹ Congress similarly directed the Commission to establish the regulatory fee program and to collect fees from its regulatees, including telecommunications carriers, to support certain regulatory functions. To achieve Congress' goals, carriers subject to contribution requirements must provide certain necessary information and contribute their equitable share to support these programs. Failure to do so threatens the integrity and viability of these Congressional mandates. The Commission cannot and will not tolerate any carrier's failure to participate in these programs as required by our rules, and we will use our forfeiture authority to penalize and deter violations such as those committed by InPhonic.

3. Furthermore, the Commission requires that providers of international telecommunications service, including resellers and wireless telecommunications carriers, must affirmatively apply for and obtain authorization from the Commission pursuant to section 214 of the Act and related Commission rules before providing such service.¹² The Commission has explained that policy considerations, including national security, law enforcement, and foreign and trade policy, necessitate Commission review prior to a carrier's provision of international service.¹³ By providing unauthorized service, InPhonic is also violating the conditions applicable to international section 214 authorizations.¹⁴ InPhonic's apparent violation of these requirements demonstrates a disregard for these important interests. The Commission cannot tolerate such violations, and must take action to ensure carrier compliance.

⁹ See 47 U.S.C. §§ 225 ("[T]he Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States").

¹⁰ 47 U.S.C. §§ 225, 254(d).

¹¹ See 47 U.S.C. § 254(d) ("Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires."); *Universal Service Contribution Methodology, Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability, Truth-In-Billing and Billing Format, IP-Enabled Services*, Report and Order and Notice of Proposed Rulemaking, WC Docket Nos. 06-122 and 04-36, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, and 98-170, 21 FCC Rcd 7518 (2006) (extending section 254(d) permissive authority to require interconnected VoIP providers to contribute to the USF) ("2006 Contribution Methodology Order").

¹² 47 U.S.C. § 214(a); 47 C.F.R. § 63.18.

¹³ See *1998 Biennial Regulatory Review of Int'l Common Carrier Regulations*, Report & Order, 14 FCC Rcd 4909, 4914-17, ¶¶ 14-18 (1999) ("1998 International Biennial Review Order").

¹⁴ See 47 C.F.R. §§ 63.21, 63.23. We note in particular that neither InPhonic nor any of its subsidiaries have filed annual traffic and revenue reports for their international service as required by the Commission's rules. See *id.* at §§ 43.61, 63.21(d).

II. BACKGROUND

4. The facts and circumstances upon which the *Order of Forfeiture* is based are set forth in the *InPhonic NAL*, and need not be reiterated here at length. InPhonic incorporated in 1997, and began providing “mobile virtual network operator,” or “MVNO,” service in August 2002.¹⁵ MVNO service is resold wireless telecommunications service.¹⁶ To provide this service, InPhonic purchases airtime from Sprint Corp. at wholesale rates, and then resells the time to end-users or third parties that, in turn, resell the time to end-users under their own brand names.¹⁷ InPhonic sells its MVNO service through Star Number, Inc., a subsidiary, and under the “Liberty Wireless” brand name (“Viva Liberty” in Spanish).¹⁸ Its service has both interstate and international components.¹⁹

A. Requirements to Register, File Periodic Revenue Information, and Contribute to USF and TRS Funds

5. Both the Act and Commission rules impose a number of obligations on providers of interstate telecommunications services, including resellers and wireless telecommunications carriers. Pursuant to section 64.1195(a) of the Commission’s rules and pursuant to Commission Order, all carriers that provide, or plan to provide, interstate telecommunications services and certain other providers of interstate telecommunications must register with the Commission by submitting certain information on FCC Form 499-A, the annual “Telecommunications Reporting Worksheet.”²⁰ The Commission created this requirement to establish “a central repository of key facts about carriers” in order to monitor the entry and operation of such providers to ensure that, among other things, they are qualified, do not engage in fraud, and do not evade oversight.²¹ Likewise, unless their revenues are *de minimis*, Commission rules require providers of interstate telecommunications services to file revenue information on both an annual and quarterly basis, using FCC Form 499-A and FCC Form 499-Q, respectively.²² The purpose of these reporting requirements is to provide the information necessary to calculate the amount that a provider of interstate telecommunications must contribute to certain regulatory programs.

¹⁵ See Response of InPhonic, Inc. to Notice of Apparent Liability, EB-05-IH-0158 (dated August 24, 2005) (“InPhonic NAL Response”), at 8. InPhonic also sells “wireless activation services” and “wireless enhanced data services,” *id.* at 7, but these services were not the subject of the *NAL*.

¹⁶ See, e.g., *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report & Analysis of Competitive Market Conditions With Respect to Commercial Mobile Radio Servs.*, Tenth Annual Report, 20 FCC Rcd 15908, 15920, ¶ 27 (2005).

¹⁷ InPhonic NAL Response at 8.

¹⁸ *Id.*

¹⁹ See, e.g., InPhonic’s Response to the Enforcement Bureau’s March 2, 2005 Inquiry Regarding Federal Regulatory Fee Payments, EB-05-IH-0158 (dated Apr. 8, 2005) (“InPhonic LOI Response”), at Ex. H.

²⁰ 47 U.S.C. § 254(d), 47 C.F.R. § 64.1195(a); *2006 Contribution Methodology Order*, 21 FCC Rcd at 7548-49, ¶ 61.

²¹ *Implementation of the Subscriber Carrier Selection Provisions of the Telecomms. Act of 1996*, Third Report & Order & Second Order on Reconsideration, 15 FCC Rcd 15996, 16024, ¶ 59 (2000).

²² 47 C.F.R. § 54.711. Carriers project future quarterly revenues on FCC Form 499-Q, and report the previous year’s revenue on FCC Form 499-A. Section 64.604(c)(5)(iii)(B) also requires common carriers to complete and submit FCC Form 499-A. *Id.* at § 64.604(c)(5)(iii)(B).

6. The information reported on the Telecommunications Reporting Worksheet is needed to administer and fund the universal service and TRS programs. Unless specifically exempt, section 54.706(a) requires all providers of interstate telecommunications services, including those that provide “mobile radio services” and “resale of interstate services,” to contribute to the USF.²³ Section 64.604(c)(5)(iii)(A) requires carriers and certain other providers of interstate telecommunications to contribute to the TRS Fund on the basis of their interstate end-user telecommunications revenues.²⁴ The Universal Service Administrative Company (“USAC”) administers the USF, and the National Exchange Carriers Association (“NECA”) administers the TRS Fund. USAC bills contributors monthly, based on the information they report on FCC Form 499-Q, with an annual “true-up,” based on the information they report on FCC Form 499-A. NECA bills contributors annually.

B. Requirement to Apply for Authorization to Provide International Telecommunications Service

7. Section 214(a) of the Act prohibits any carrier from constructing, extending, or operating any line, and from engaging in transmission through any such line, “unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity” require, or will require, the construction, extension, or operation of the line.²⁵ While the Commission has granted “blanket” authority to carriers providing domestic service,²⁶ meaning that such carriers need not apply to the Commission for such authority before providing domestic service, the Commission has not done the same for providers of international telecommunications services.²⁷ Rather, section 63.18 of the Commission’s rules requires that any carrier that seeks section 214 authority “for provision of common carrier communication services between the United States, its territories or possessions, and a foreign point shall request such authority by application.”²⁸ Through this process the applicant provides the Commission with, among other things, contact information, ownership information, information on any affiliations it may have with foreign carriers, certification that it will comply with Commission rules, and certification that the applicant is not subject to denial of Federal benefits pursuant to the Anti-Drug Abuse Act of 1988.²⁹ The application requirement applies to carriers that resell the service of another authorized carrier,³⁰ and to domestic providers of wireless telecommunications service that also provide international telecommunications service.³¹

²³ *Id.* at § 54.706(a).

²⁴ *Id.* at § 64.604(c)(5)(iii)(A).

²⁵ 47 U.S.C. § 214(a).

²⁶ 47 C.F.R. § 63.01(a) (“Any party that would be a domestic interstate communications common carrier is authorized to provide domestic, interstate services to any domestic point and to construct or operate any domestic transmission line as long as it obtains all necessary authorizations from the Commission for use of radio frequencies.”).

²⁷ *Implementation of Section 402(b)(2)(A) of the Telecomms. Act of 1996*, Report & Order in CC Docket No. 97-11, Second Memorandum Opinion & Order in AAD File No. 98-43, 14 FCC Rcd 11364, 11366 n. 8 (1999) (grant of blanket authority is only for domestic services and does not extend to the provision of international services).

²⁸ 47 C.F.R. § 63.18.

²⁹ *See id.*

³⁰ *See id.* at § 63.18(e)(2).

³¹ *1998 International Biennial Review Order*, 14 FCC Rcd at 4926-27, ¶¶ 38-39. *See also Personal Communications Indus. Ass’n’s Broadband Personal Communications Servs. Alliance’s Pet. for Forbearance for Broadband Personal Communications Servs.*, Memorandum Opinion & Order & Notice of Proposed Rulemaking, 13 FCC Rcd 16857, 16881-84, ¶¶ 45-54 (1998) (declining PCIA’s request to forbear from requiring section 214 (continued...))

C. The Commission's Investigation

8. In 2004, the Enforcement Bureau ("Bureau") sought to identify resellers of telecommunications service that had failed to register as telecommunications service providers with the Commission as well as satisfy other Commission program requirements. To this end, on March 30 and August 9, 2004, the Bureau's audit staff sent letters to the company requesting information pertaining to InPhonic's compliance with section 64.1195 of the Commission's rules.³² On January 18, 2005, InPhonic stated that it still had not registered, but it intended to submit by January 31, 2005, all appropriate filings due since the company's incorporation in August 2002.³³ On January 28, 2005, InPhonic filed three FCC Form 499-Qs, which had been due on May 1, August 1, and November 1, 2004. On January 31, 2005, InPhonic finally registered by filing its 2003 Form 499-A, and also filed its 2004 Form 499-A.³⁴

9. On March 2, 2005, the Bureau issued a letter of inquiry ("LOI") to InPhonic.³⁵ The LOI directed InPhonic to, among other things, submit a sworn, written response to a series of questions relating to InPhonic's apparent failure to register, file Telecommunications Reporting Worksheets, and make mandated federal telecommunications regulatory program payments. On March 18, 2005, InPhonic paid USAC \$889,189 for USF contributions it owed based on its 2002, 2003 and 2004 revenue.³⁶ InPhonic responded to the LOI on April 8, 2005.³⁷ InPhonic made its first TRS Fund payment of \$22,455.04 on April 25, 2005, approximately nine months after its 2004 TRS contribution became due on July 26, 2004.

10. Under section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.³⁸ Section

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authority for a broadband PCS carrier to provide international services) ("*PCIA Forbearance Order*"); *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Servs.*, Second Report & Order, 9 FCC Rcd 1411, 1481 n. 369 (1994) (declining to forbear from application of section 214 to CMRS carriers' provision of international services).

³² See Letter from Hugh Boyle, Chief Auditor, Investigations and Hearings Division, Enforcement Bureau, to InPhonic (dated Mar. 30, 2004) ("Mar. 30, 2004 Audit Letter"); Letter from Hugh Boyle, Chief Auditor, Investigations and Hearings Division, Enforcement Bureau, to InPhonic (dated Aug. 9, 2004) ("Aug. 9, 2004 Audit Letter").

³³ Letter from Karly E. Baraga, Esq., Kelly Drye & Warren, LLP, counsel to InPhonic, Inc., to Hugh L. Boyle, Chief Auditor, Investigations & Hearings Division, Enforcement Bureau, Federal Communications Commission (dated Jan. 18, 2005) ("InPhonic Jan. 18, 2005 Letter").

³⁴ On April 1, 2005, InPhonic filed its 2005 Form 499-A on a timely basis. InPhonic provided the Bureau no other annual or quarterly Telecommunications Reporting Worksheets. InPhonic stated however that it filed its Quarterly Worksheet for February 1, 2005, in a timely manner. See InPhonic LOI Response at 2.

³⁵ Letter from Hillary S. DeNigro, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Darius B. Withers, Esq., Kelley Drye & Warren, LLP, counsel to InPhonic, Inc. (dated March 2, 2005) ("*InPhonic LOI*").

³⁶ InPhonic LOI Response at Ex. I. According to USAC, InPhonic owed \$917,251.59 for USF contributions, which was due on March 15, 2005.

³⁷ InPhonic LOI Response, *supra* note 21.

³⁸ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.³⁹ The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act,⁴⁰ and the Commission has so interpreted the term in the section 503(b) context.⁴¹ The Commission may also assess a forfeiture for violations that are merely repeated, and not willful.⁴² “Repeated” means that the act was committed or omitted more than once, or lasts more than one day.⁴³ To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.⁴⁴ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.⁴⁵

11. On July 25, 2005, we released the *InPhonic NAL*.⁴⁶ We proposed a forfeiture of \$819,905 against InPhonic for its apparent violations of (1) section 64.1195 of the Commission’s rules by failing to register with the Commission; (2) sections 54.711 and 64.604(c)(5)(iii)(B) of the Commission’s rules by failing to file Telecommunications Reporting Worksheets; (3) section 54.706(a) of the Commission’s rules by failing to contribute to the USF; and (4) section 64.604(c)(5)(iii)(A) of the Commission’s rules by failing to contribute to the TRS Fund.

12. InPhonic filed its response to the *NAL* on August 24, 2005.⁴⁷ InPhonic does not deny that it engaged in each of the violations described in the *NAL*, or that it deliberately, intentionally, and repeatedly engaged in the acts that constitute its violations; indeed, it acknowledges that “it was late in complying with its regulatory and universal service obligations.”⁴⁸ Yet, InPhonic argues that the forfeiture proposed in the *NAL* must be eliminated or reduced for several reasons. First, InPhonic argues that the *NAL* was unlawful because InPhonic does not hold, and is not an applicant for, an authorization from the Commission, and in such instances, section 503(b)(5) of the Act requires the Commission to issue a citation before it can impose a notice of apparent liability for forfeiture.⁴⁹ Second, InPhonic asserts that the statute of limitations has run on its failure to make timely TRS Fund payments.⁵⁰ Third, InPhonic asserts that the proposed forfeitures for each of its violations are arbitrary, capricious and

³⁹ 47 U.S.C. § 312(f)(1).

⁴⁰ H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

⁴¹ See, e.g., *Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion & Order, 6 FCC Rcd 4387, 4388, ¶ 5 (1991) (“*Southern California Broadcasting Co.*”).

⁴² See, e.g., *Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator’s repeated signal leakage) (“*Callais Cablevision, Inc.*”).

⁴³ *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362, ¶ 9; *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5.

⁴⁴ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

⁴⁵ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591, ¶ 4 (2002) (“*SBC Forfeiture Order*”) (forfeiture paid).

⁴⁶ *InPhonic NAL*, *supra* note 1.

⁴⁷ InPhonic NAL Response, *supra* note 15.

⁴⁸ *Id.* at 4.

⁴⁹ *Id.* at 3-4, 15-17.

⁵⁰ *Id.* at 18-19.

excessive, and do not comply with the Administrative Procedures Act.⁵¹ Finally, InPhonic asserts that proposed penalties in the *NAL* are disproportionate to the Commission's treatment of other carriers and are therefore discriminatory.⁵²

13. Since InPhonic filed its response to the *NAL*, the Bureau has also investigated whether the company has obtained formal authorization required by section 214 of the Act to provide international telecommunications service, given InPhonic's claim that it is immune from forfeiture because it does hold and is not an applicant for a Commission-issued authorization. In fact, the Bureau has learned that InPhonic apparently does not hold, and has never held, such required authorization.

III. ORDER OF FORFEITURE

14. We find by a preponderance of the evidence that InPhonic willfully and repeatedly engaged in the violations described in the *NAL*. More specifically, we find that InPhonic willfully and repeatedly violated (1) section 64.1195 of the Commission's rules by failing to register with the Commission; (2) sections 54.706(a) and 64.604(c)(5)(iii)(B) of the Commission's rules by failing to file Telecommunications Reporting Worksheets on multiple occasions; (3) section 254(d) of the Act and section 54.711(a) of the Commission's rules by failing to contribute to the USF on a timely basis on multiple occasions; and (4) section 64.604(c)(5)(iii)(A) of the Commission's rules by failing to contribute to the TRS Fund on a timely basis on multiple occasions.

15. Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to \$120,000 for each violation or each day of a continuing violation, up to a statutory maximum of \$1.2 million for a single act or failure to act before September 7, 2004, and up to \$130,000 for each violation or each day of a continuing violation, up to a statutory maximum of \$1.325 million for a single act or failure to act for violations occurring on or after September 7, 2004.⁵³ In determining the appropriate forfeiture amount, we consider the factors enumerated in section 503(b)(2)(D) of the Act, including "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."⁵⁴

16. In *Globcom*,⁵⁵ we issued a forfeiture against a carrier for willful and repeated violations of section 254(d) of the Act and sections 54.706(a), 54.711(a), and 64.604 of the Commission's rules.⁵⁶ We issued a total forfeiture of \$806,861, as follows:

- for Globcom's apparent failure to pay universal service contributions, we applied a base forfeiture amount of \$20,000 for 12 months of nonpayment and added one-half of the total unpaid universal service contributions (\$340,918) to the base forfeiture of \$240,000, for a proposed forfeiture of \$580,918;

⁵¹ *Id.* at 19-28.

⁵² *Id.* at 7, 30-37.

⁵³ 47 U.S.C. § 503(b)(2)(B).

⁵⁴ *Id.*

⁵⁵ *Globcom, Inc.*, Order of Forfeiture, 21 FCC Rcd 4710, 4721-24, ¶¶ 29-38 (2006) ("*Globcom Forfeiture Order*"); *Globcom, Inc. d/b/a Globcom Global Communications*, Notice of Apparent Liability for Forfeiture & Order, 18 FCC Rcd 19893, 19902-05, ¶¶ 22-32 (2003) ("*Globcom NAL*").

⁵⁶ 47 U.S.C. § 254(d); 47 C.F.R. §§ 54.706(a), 54.711(a), 64.604.

- for Globcom's apparent failure to pay TRS fund contributions, we applied a base forfeiture amount of \$10,000 for each of the two violations and added one-half of the total unpaid balance (\$5,943), for a proposed forfeiture of \$25,943;
- for Globcom's apparent filing of an inaccurate Annual Worksheet, we applied a forfeiture of \$50,000; and
- for Globcom's apparent failure to submit Quarterly and Annual Worksheets, we applied a forfeiture of \$50,000 for three occasions when Globcom failed to file the revenue information, for a total forfeiture of \$150,000.⁵⁷

17. In the *InPhonic NAL*, we proposed a forfeiture of \$819,905. We arrived at this amount as follows:

- for InPhonic's apparent failure to register with the Commission, we proposed a forfeiture of \$100,000;
- for InPhonic's apparent failures to submit Telecommunications Reporting Worksheets, we proposed a forfeiture of \$50,000 for two such failures within the one-year period preceding the issuance of the *NAL*, for a total proposed forfeiture of \$100,000;
- for InPhonic's apparent failure to pay universal service contributions, we proposed a base forfeiture amount of \$20,000 per month for seven months of nonpayment within the one-year period preceding the issuance of the *NAL*, and added an upward adjustment of one-half of the total unpaid universal service contributions (\$458,626) to the base forfeiture of \$140,000, for a total proposed forfeiture of \$598,626; and
- for InPhonic's apparent failure to pay TRS Fund contributions, we proposed a base forfeiture amount of \$10,000 and added an upward adjustment of one-half of the carrier's estimated unpaid TRS Fund contributions (\$11,279), for a total proposed forfeiture of \$21,279.

As explained below, we reject each of InPhonic's arguments that we should either cancel the entire forfeiture, or cancel or reduce certain components of the forfeiture, and we therefore impose the forfeiture of \$819,905 proposed in the *NAL*.⁵⁸

⁵⁷ *Globcom Forfeiture Order*, 21 FCC Rcd at 4721, ¶ 31.

⁵⁸ InPhonic argues that the *InPhonic NAL* is factually inaccurate in a number of ways, although the company does not appear to contend that these "mistakes" justify cancellation or reduction of the forfeiture, but rather indicate that the company is not as lax about compliance as the *NAL* suggests. As indicated above, the Bureau first sent InPhonic a letter inquiring about some of the facts that led to the *NAL* on March 30, 2004, and after receiving no response, the Bureau followed up with a second letter on August 9, 2004. *InPhonic NAL*, 20 FCC Rcd at 13280, ¶ 9. InPhonic claims that it never received either of these letters, that in fact, the Bureau first contacted the company on January 10 or 11, 2005, and by that time the company was already taking steps to correct its failures that are the subject of the *NAL*. InPhonic *NAL* Response at 8-15. Notwithstanding InPhonic's receipt of the 2004 letters, however, it does not claim that it *voluntarily* brought its failures to the attention of the Commission, or that it in fact corrected any of its violations until *after* it received inquiries from the Bureau in January 2005. Moreover, while InPhonic notes it did register and file Telecommunications Reporting Worksheets in late January 2005, it does *not* dispute that it did not make any payments to the USF until March 18, 2005, or to the TRS Fund until April 25, 2005, after the Bureau issued its LOI. By this time, as the *InPhonic NAL* concludes, the company had been operating without participating in any of the Commission programs at issue since 2002. In sum, the Bureau clearly was investigating InPhonic in the absence of any disclosure by the company of its wrongdoing, and before InPhonic corrected any of the filing, (continued...)

A. Commission Authority to Issue the Proposed Forfeitures

18. InPhonic first argues that the *InPhonic NAL* is unlawful and must be cancelled because the company does not hold, and is not applying for, any kind of authorization issued by the Commission. As such, InPhonic argues that pursuant to section 503(b)(5) of the Act, the Commission must issue it a citation and provide an opportunity for a personal interview before issuing a notice of apparent liability.⁵⁹

19. Significantly, InPhonic does not quote the pertinent sentence in section 503(b)(5) of the Act, to wit: “This paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required...”⁶⁰ Thus, although an entity that has not applied for and does not hold an FCC authorization must ordinarily receive a citation before becoming subject to forfeiture, that entity is subject to forfeiture if it is engaged in an activity that requires FCC authorization. As discussed above and below,⁶¹ InPhonic provides international telecommunications service, and is required to apply for and obtain authorization to do so from the Commission. Therefore, the fact that InPhonic is required to have such authorization but has not in fact applied for it does not preclude the Commission from issuing the *NAL* and proceeding with this *Order of Forfeiture* pursuant to section 503(b).⁶²

B. Statute of Limitations on the TRS Violation

20. InPhonic next argues that the one-year statute of limitations for InPhonic’s failure to timely pay its TRS Fund contributions has expired.⁶³ InPhonic explains that the *NAL* was mailed on July 27, 2005, but its failure to contribute to the TRS Fund that was the subject of the *NAL* occurred on July 26, 2004.⁶⁴

21. Section 503(b)(6) of the Act provides that the Commission cannot impose a forfeiture penalty against a carrier “if the violation charged occurred more than 1 year prior to the date of *issuance*

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non-payment, and registration violations that are the subject of the *NAL*. The company therefore is not entitled to a reduction in the proposed forfeiture amount.

⁵⁹ InPhonic *NAL* Response at 15-17. InPhonic states that section 503(b)(5) of the Act provides: “No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, and if such person is not an applicant for a license, permit, certificate, or other authorization issued by the Commission, unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission which is nearest to such person's place of residence; and (C) subsequently engages in conduct of the type described in such citation.” 47 U.S.C. § 503(b)(5).

⁶⁰ *Id.* at § 503(b)(5).

⁶¹ *See supra* ¶ 7 and *infra* ¶¶ 35-41.

⁶² Because we find that InPhonic is subject to section 503(b)(1)(B) given the requirement that it must obtain Commission authorization under section 214, we need not and do not rule herein on InPhonic’s position that it is not a Commission licensee.

⁶³ InPhonic *NAL* Response at 18-19.

⁶⁴ *Id.* at 19 & n.17.

of the required notice or notice of apparent liability.”⁶⁵ Thus, the statute does not require service by mail of the *NAL* on InPhonic within one year of its failure to contribute to the TRS Fund, but rather issuance of the *NAL*.⁶⁶ The date of issuance of a notice of apparent liability is the date of its public notice, which may or may not coincide with the date of service. Under Commission rules, the date of public notice of non-rulemaking documents, like the *InPhonic NAL*, is the date the Commission releases the document.⁶⁷ The Commission released the *NAL* on July 25, 2005 by making the full text of the document available to the public at Commission headquarters on that date, and thus issued the document within one year of the company’s failure to make its TRS Fund contribution on July 26, 2004. In addition, although not legally required to do so, on the same date the Commission issued the *NAL*, the Bureau also served the document by facsimile on the counsel who had represented the company in connection with the investigation that led to the *InPhonic NAL*, providing actual notice to InPhonic’s counsel in the investigation.

22. In its response to the *InPhonic NAL*, the company admits that “a copy of the *NAL* was faxed at 4:47 pm on July 25, 2005 to Darius Withers of the law firm of Kelley Drye & Warren LLP,” but claims that the firm is only “one of a handful of law firms that represents InPhonic,” and was “never authorized to represent InPhonic with regard to the *NAL*”⁶⁸ InPhonic’s attempt to distance itself from its lawyers is meritless, and we find that the company was actually served through Mr. Withers on July 25, 2005. The *InPhonic NAL* arises out of Commission File No. EB-05-IH-0158, the same file number carried by the *InPhonic LOI*. InPhonic’s response to the *LOI* was submitted over the signature of Mr. Withers and other lawyers at Kelley Drye, identifying themselves as “*Counsel to InPhonic, Inc.*”⁶⁹ The *LOI Response* was supported by affidavits from InPhonic’s General Counsel, Senior Vice President and Corporate Treasurer, and Chief Financial Officer. Prior to release of the *InPhonic NAL* in the investigation, the Commission received no notice that Kelley Drye and/or Mr. Withers no longer represented InPhonic. Therefore, we find that service on Mr. Withers constituted service on InPhonic for purposes of the *InPhonic NAL*.

C. Administrative Procedure Act and Section 503(b)(2)(D)

23. InPhonic also argues that the forfeitures for each of its violations must be reduced because, it claims, we did not consider our forfeiture guidelines, which are in effect binding rules, and we did not explain why InPhonic’s conduct in particular justified a higher penalty than the amounts set forth in the guidelines.⁷⁰ For example, with respect to the \$100,000 forfeiture we proposed for InPhonic’s registration

⁶⁵ 47 U.S.C. § 503(b)(6)(B) (emphasis supplied).

⁶⁶ See *Colorado Small Business Dev. Assoc., Inc.*, Memorandum Opinion & Order, 15 FCC Rcd 24314, 24316, ¶ 7 (2000) (“the statute does not require that the *NAL* be received within one year of the violation, but that the *NAL* must be issued within one year of the violation.”).

⁶⁷ Cf. 47 C.F.R. § 1.4(b)(2). InPhonic is correct that the Commission did not list the *InPhonic NAL* on its electronic daily list of releases until July 26, 2005. See *InPhonic NAL Response* at 19 n.17. The *InPhonic NAL*, however, appeared along with seven others under the boldface heading “ADDENDA: THE FOLLOWING ITEMS, RELEASED JULY 25, 2005, DID NOT APPEAR IN DIGEST NO. 140,” *i.e.*, the agency’s daily list of releases for the preceding day. Daily Digest, Vol. 24, No. 141 (July 26, 2005). The documents were released the preceding day by operation of the Commission’s procedures. At that same time, the Commission also made the documents available to the public. The Commission routinely provides information electronically about some documents the day after they are released. The date of issuance of a non-rulemaking document like the *InPhonic NAL* is however the date of release, the date the Commission makes the full text of the document available to the public.

⁶⁸ *InPhonic NAL Response* at 19, n.17.

⁶⁹ *InPhonic LOI Response* at 2.

⁷⁰ *InPhonic NAL Response* at 20-29.

violation, InPhonic states that we should have begun our calculation with the base forfeiture of \$3,000 for “failure to file required forms or information” set forth in our forfeiture guidelines.⁷¹ InPhonic acknowledges that the Commission can deviate from the guidelines as warranted by consideration of the criteria set forth in section 503(b)(2)(D), but it claims that we did not apply these factors to InPhonic’s situation. As a result, InPhonic claims that the amounts of the forfeitures we proposed for its various violations do not comply with the Administrative Procedure Act or section 503(b)(2)(D) of the Act.⁷²

24. As a preliminary matter, InPhonic is simply wrong that the Commission has ignored the base forfeiture amounts specified in our guidelines.⁷³ The base forfeitures in the guidelines are preceded by explicit statements that “[t]he Commission and its staff *may* use these guidelines in particular cases[, and] *retain the discretion* to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute.”⁷⁴ The base forfeitures in the guidelines are then followed by the criteria that the Commission may use to adjust a forfeiture upward or downward.⁷⁵ InPhonic itself acknowledges that the base forfeiture amounts specified in the guidelines are not, in fact, binding rules that the Commission must follow when it concedes that the Commission may deviate from the guidelines in accordance with the criteria set forth in section 503(b)(2)(D).⁷⁶ In any event, the Commission’s established methodologies for determining the amount of the forfeiture for the particular violations at issue here do take into account the base forfeiture amounts, as well as the upward and downward adjustment criteria, specified in section 1.80 of the Commission’s rules.⁷⁷ The Commission followed this methodology exactly in the *InPhonic NAL*.

⁷¹ 47 C.F.R. § 1.80(b)(4).

⁷² InPhonic argues that the forfeitures we proposed for its failures to file Telecommunications Reporting Worksheets and for failures to contribute to the USF and TRS Funds suffer from the same deficiencies, *i.e.*, that we did not begin with what InPhonic contends are the applicable base forfeitures for the violations, and that we did not explain why we deviated from the base forfeitures in InPhonic’s particular case. InPhonic NAL Response at 26-29.

⁷³ InPhonic cites *U.S. Telecom Ass’n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994) for the proposition that the D.C. Circuit “has concluded that where the Commission codifies penalties for particularized behavior such penalties constitutes [sic] Commission Rules and the Commission must, to some extent, be constrained by them because they are binding Rules.” InPhonic NAL Response at 23. InPhonic misrepresents the case. The court found that the Commission’s earlier forfeiture standards should have been subject to notice and comment because the standards functioned as a rule and not a policy statement, in part because the agency seldom deviated from strict application of the standards. The court did not make the global pronouncement InPhonic claims. Following the *USTA* case, the Commission revised the standards, recast them as guidelines and has applied them without the rigidity that attended the old standards. Indeed, in arguing that the Commission has failed to adhere strictly to the guidelines, InPhonic appears to recognize the fact that we do not treat the guidelines as binding rules. InPhonic also appears to recognize as much when it later acknowledges that the *InPhonic NAL* and the *USTA* case involve “opposite” problems. *Id.* at 25.

⁷⁴ 47 C.F.R. § 1.80(b)(4), note (emphasis supplied).

⁷⁵ *Id.* See also *Commission’s Forfeiture Policy Statement & Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report & Order, 12 FCC Rcd 17087, 17101, ¶ 29 (1997) (“1997 Forfeiture Policy Statement”) (explaining that “[b]ecause th[e] forfeiture guidelines that are being adopted as a Note to Section 1.80] is only a guideline and not a binding rule, however, the Commission retains its discretion to depart from the guidelines where appropriate”).

⁷⁶ InPhonic NAL Response at 21.

⁷⁷ 47 C.F.R. § 1.80. See, e.g., *Globcom Forfeiture Order*, 21 FCC Rcd at 4721-24, ¶¶ 31-38; *Globcom NAL*, 18 FCC Rcd at 19905, ¶¶ 31-32 (“The Commission’s Forfeiture Policy Statement and implementing rules establish \$3,000 as the base forfeiture for failing to provide required forms or information. We find that a substantial upward adjustment is appropriate [for failing to file periodic revenue information].”); *InPhonic NAL* at 13286-87, ¶¶ 25-26 (“The Commission’s Forfeiture Policy Statement and implementing rules prescribe a base forfeiture of \$3,000 for failure to file required forms or information. ... Taking into account all of the factors enumerated in section (continued...)”).

25. Next, with respect to section 503(b)(2)(D), InPhonic is wrong that we did not comply with the Act because the forfeiture was not sufficiently tied to InPhonic in particular. For example, with respect to the registration violation, InPhonic states that instead of “a particularized Section 503(b)(2)(D) analysis, the FCC proceeds to a generic discussion of the importance of registering and of how failing to do so can undermine the universal service system.”⁷⁸ It thus claims that “there is *no analysis* provided in support of *any* upward adjustment, much less the extraordinary upward adjustment in this case.”⁷⁹

26. InPhonic’s position misrepresents both the statute and our analysis. InPhonic suggests that our “generic discussion of the importance of registering” is irrelevant to determining the amount of a forfeiture for violation of section 64.1195 of the Commission’s rules. This construction of section 503(b)(2)(D) ignores the fact that the statute directs the Commission to consider certain factors about the *violation itself*, in addition to certain factors about the *particular violator*, in establishing a forfeiture. Section 503(b)(2)(D) states: “In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.” In establishing a forfeiture, the Commission must consider certain features about *both* the violation and the violator.

27. Our analysis satisfied both prongs of section 503(b)(2)(D) for each of InPhonic’s violations. For example, with respect to the registration violation, we explained, as InPhonic itself acknowledges, the importance of the registration requirement and how noncompliance compromises not only the USF, but also other statutorily-mandated programs.⁸⁰ We also compared the failure to register to the failure to file Telecommunications Reporting Worksheets, and explained why the registration violation is more severe and therefore warrants a higher forfeiture.⁸¹ With respect to InPhonic itself, we considered the degree of the company’s culpability and explained that InPhonic had violated the registration requirement from the time it began providing service until January 31, 2005.⁸² In addition, we acknowledged that InPhonic had cured its registration violation before we issued the *NAL*, but explained that such action did not reduce the severity of the violation because the company did not cure the problem until after the Bureau made inquiries about the violations.⁸³ We also indicated that we would consider arguments about InPhonic’s ability to pay before imposing a forfeiture under certain conditions.⁸⁴ Thus, our analysis of the registration violation considered all of factors set forth in section 503(b)(2)(D), and the analysis

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503(b)(2)(D) of the Act, we conclude that a proposed forfeiture of \$100,000 is warranted [for failing to register with the Commission pursuant to section 64.1195 of the Commission’s rules].”).

⁷⁸ InPhonic *NAL* Response at 23-24.

⁷⁹ *Id.* at 25-26 (emphasis in original).

⁸⁰ *InPhonic NAL*, 20 FCC Rcd at 13287, ¶ 25.

⁸¹ *Id.* at 13287, ¶ 26. *See also id.* at 13282, ¶ 15. We therefore disagree with InPhonic that we were “analytically wrong” in assigning a higher forfeiture for failure to register than failure to file Telecommunications Reporting Worksheets. As we explained in the *NAL*, “failure to register is an even more egregious violation” because carriers that are not on record operate outside of the requirements of the Act and the Commission’s rules, and can only be detected through time-intensive compliance reviews, which delays detection of their misconduct, and imposes administrative burdens on the Commission. *Id.* at 13287, ¶ 26.

⁸² *Id.* at 13282, ¶ 14.

⁸³ *Id.* at 13283, ¶ 16.

⁸⁴ *Id.* at 13289, ¶ 38.

appropriately supports a forfeiture of \$100,000. Our analysis of InPhonic's other violations also considered both the general impact of noncompliance with each rule, and the degree of InPhonic's misconduct in particular.⁸⁵

28. Although InPhonic claims on one hand that our analyses of the appropriate forfeitures for its various violations were not sufficiently tied to its misconduct in particular, on the other hand the company also attacks our approach of basing the upward adjustment for nonpayment to the TRS Fund and the USF on one-half of the balance that a company owed to the funds. This approach, however, which the Commission has consistently followed in numerous recent cases,⁸⁶ ties the upward adjustment of the forfeiture to the impact that a company's failure to contribute had on the funds, and, as a consequence, the impact on company's competitors. As the Commission has repeatedly stated, the upward adjustment "illustrate[s] that a delinquent carrier's culpability and the consequential damage it causes to the goal of universal service may vary with the size of the contribution it fails to make."⁸⁷ It is therefore difficult to envision an approach that better satisfies that aspect of section 503(b)(2)(D) that mandates that we base a forfeiture on the "degree of culpability" of a violator – exactly what InPhonic claims we did not do – and on the "extent[] and gravity of the violation." Yet InPhonic claims that consideration of any amount owing to either fund for any period of time beyond the twelve months immediately preceding the date of the NAL violates the one-year statute of limitations set forth in section 503(b)(6) of the Act.⁸⁸ It is a well-settled principle of law, however, that the Commission may properly consider prior offenses that occurred more than one year before a violation to establish the context for determining an appropriate forfeiture amount.⁸⁹ As a result, our approach to the upward adjustment to the forfeiture for violations for nonpayment to the TRS Fund and USF not only does not violate the one-year statute of limitations, but in fact, best realizes the mandate in section 503(b)(2)(D) that our forfeitures take into account the "degree of culpability" of a particular violator.

D. Discriminatory Treatment

29. As its final argument, InPhonic contends that the forfeitures proposed in the *NAL* are much larger than penalties imposed against small carriers for similar violations, and would effect a greater punishment on InPhonic than penalties that have been imposed on larger carriers. As a result, the *NAL*

⁸⁵ See *id.* at 13283-84, ¶¶ 17-19 & 13288, ¶ 27 (failure to file Worksheets); *id.* at 13284, ¶ 20 & 13288, ¶ 28-29 (failure to contribute to the USF); *id.* at 13285, ¶ 21-22 & 13288-89, ¶ 30-31 (failure to contribute to the TRS Fund).

⁸⁶ E.g., *Globcom Forfeiture Order*, 21 FCC Rcd at 4721, ¶ 31.

⁸⁷ *Globcom NAL*, 18 FCC Rcd at 19904, ¶ 27 (quoting *Matrix Telecom, Inc.*, Notice of Apparent Liability, 15 FCC Rcd 13544, 13547, ¶ 8 (2000), which cites *Conquest Operator Servs. Corp.*, Forfeiture Order, 14 FCC Rcd 12518, 12527, ¶ 19 (1999)).

⁸⁸ InPhonic NAL Response at 29-30.

⁸⁹ E.g., *Roadrunner Transp., Inc.*, Forfeiture Order, 15 FCC Rcd 9669, 9671-72, ¶ 8 (2000) ("While the Commission may not ... find the Licensees liable for violations committed prior to [the NAL], it may lawfully look at facts arising before that date in determining an appropriate forfeiture amount."); *Cate Communications Corp.*, Memorandum Opinion & Order, 60 Rad Reg 2d 1386, 1388, ¶ 7 (1986) (holding that facts prior to the statute of limitations period may be used to place "the violations in context, thus establishing the licensee's degree of culpability and the continuing nature of the violations"); *Eastern Broadcasting Corp.*, Memorandum Opinion & Order, 11 FCC2d 193, 195, ¶ 6 (1967) ("Earlier events may be utilized to shed light on the true character of matters occurring within the limitations period."). InPhonic apparently fails to "distinguish between conduct the Commission may consider in determining a licensee liable for a forfeiture and conduct or other matters the Commission may consider in determining the degree of culpability." *Eastern Broadcasting Corp.*, 11 FCC2d at 193, ¶ 2 (1967).

“arbitrary [sic] and capriciously discriminates against InPhonic and for this reason alone the NAL should be cancelled.”⁹⁰

30. As support for its argument involving the larger carriers, InPhonic cites two enforcement matters, one involving SBC Communications and the other involving Verizon Communications.⁹¹ In *SBC Communications*, the Commission imposed a forfeiture of \$6,000,000 against SBC for violating conditions of the Commission’s approval of the merger between SBC and Ameritech Corporation.⁹² InPhonic claims that this forfeiture constitutes approximately 0.013 percent of SBC’s annual common carrier revenues and 0.1 percent of its net income, while the forfeiture of approximately \$820,000 against InPhonic represents 1.7 percent of its common carrier revenues and a net loss in its income.⁹³ InPhonic does not mention, however, that the forfeiture imposed against SBC was the statutory maximum for the violations at issue, while that proposed against InPhonic does not begin to approach the maximum for its multiple violations, which would be nearly \$15,000,000.⁹⁴

31. In *Verizon Communications*, the Bureau admonished, but did not impose a forfeiture against, the company for failure to publicize certain services in six states in accordance with Commission rules, because the statute of limitations set forth in section 503(b)(6) had expired for these violations. The Bureau explained that “[b]ecause Verizon undertook renewed outreach efforts in these six states within the last year, we are constrained from pursuing a proposed forfeiture at this time.”⁹⁵ InPhonic claims that the Bureau did not say that the statute of limitations had run, and that “because the failure had been rectified prior to the issuance of the forfeiture order, ... the Commission could not lawfully impose a forfeiture on Verizon.”⁹⁶ Because the Commission did not take this approach with InPhonic, the company claims that we engaged in “discriminatory treatment of the Commission’s Rules against a small carrier in favor [of] a large carrier.”⁹⁷ InPhonic mischaracterizes the admonishment. The Bureau clearly explained that Verizon’s failures occurred in between January 2001 and December 2003, more than twelve months before the admonishment was issued in 2005.⁹⁸ Thus, the fact that the Bureau admonished Verizon but issued an NAL against InPhonic does not evidence any form of discrimination against InPhonic.

32. As support for its claim that the Commission’s actions against *smaller* carriers demonstrate discrimination, InPhonic points to a number of cases where InPhonic asserts the Commission assessed or proposed lesser penalties against such carriers for nonpayment into the USF.⁹⁹ In each of these cases, the

⁹⁰ InPhonic NAL Response at 31.

⁹¹ *Id.* at 31-35 (citing *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 19923 (2002); *Verizon Communications, Inc.*, Memorandum Opinion & Order, 20 FCC Rcd 4244 (Enf. Bur. 2005)).

⁹² *SBC Communications*, 17 FCC Rcd at 19934, ¶ 23.

⁹³ InPhonic NAL Response at 35.

⁹⁴ The statutory maximum forfeiture against InPhonic for its failure to register, file two Worksheets, make seven USF contributions, and make one TRS Fund contribution would be \$14,575,000.

⁹⁵ *Verizon Communications*, 20 FCC Rcd at 4247, ¶ 8.

⁹⁶ InPhonic NAL Response at 32.

⁹⁷ *Id.* at 34.

⁹⁸ *Verizon Communications*, 20 FCC Rcd at 4246, ¶ 5.

⁹⁹ InPhonic NAL Response at 35-36 (citing *PTT Telekom*, Notice of Apparent Liability, 16 FCC Rcd 7477, 7479-80, ¶¶ 7-8 (2001); *America's Tele-Network Corp.*, Notice of Apparent Liability, 15 FCC Rcd 20903, 20906, ¶¶ 8-9 (2000) (“ATNC”); *Intellicall Operator Servs.*, Notice of Apparent Liability, 15 FCC Rcd 13539, 13541-42, ¶¶ 7-8 (continued...))

Commission assessed a base forfeiture of \$20,000 for one or two months of nonpayment, with an upward adjustment of one-half of the carrier's balance owed to the fund for one or two months, whereas we proposed a base forfeiture of \$20,000 for each month that InPhonic did not contribute to the USF within the one-year period preceding the *NAL*, with an upward adjustment of one-half of its total outstanding balance.

33. As we explained in *Globcom*, since the *ConQuest* decision it has become apparent that substantially larger forfeiture amounts are needed to deter carriers from violating our universal service contribution and reporting rules.¹⁰⁰ The Commission held that the time had come to implement a substantially greater forfeiture amount in order to deter carriers from violating our universal service contribution and reporting rules.¹⁰¹ Clearly, our method of assessing forfeitures prior to *Globcom* was not a sufficient deterrent.¹⁰² Therefore, consistent with prior Commission warnings concerning likely increases in forfeiture amounts, we properly increased the number of months of USF nonpayment on which we assess forfeiture amounts and the discretionary upward adjustment, and the Commission fully explained the reasons for doing so.¹⁰³

E. Conclusion

34. Accordingly, we find no reason to cancel or reduce the forfeiture we proposed in the *InPhonic NAL*. As a result, we impose a forfeiture of \$819,905 against InPhonic.

IV. FURTHER NOTICE OF APPARENT LIABILITY FOR FORFEITURE

35. In today's Order we also find that InPhonic is apparently in violation of section 214(a) of the Act¹⁰⁴ and section 63.18 of the Commission's rules¹⁰⁵ by willfully and repeatedly failing to apply for and obtain authorization from the Commission to provide international telecommunications service. Accordingly, we find that InPhonic is apparently liable for an additional forfeiture of \$100,000.

36. Section 214(a) of the Act prohibits any carrier from constructing, extending, or operating any line, and from engaging in transmission through any such line, "unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity" require, or will require, the construction, extension, or operation of the line.¹⁰⁶ Part 63 of the

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(2000); *Matrix*, 15 FCC Rcd at 13546-47, ¶¶ 7-8; *North American Tel. Network, LLC*, Notice of Apparent Liability, 15 FCC Rcd 14022, 14024, ¶ 8 (2000); *Conquest*, 14 FCC Rcd at 12527-28, ¶¶ 19-20).

¹⁰⁰ *Globcom Forfeiture Order*, 21 FCC Rcd at 4723-24, ¶ 36; *Globcom NAL*, 18 FCC Rcd at 19903, ¶¶ 25-26.

¹⁰¹ *Globcom Forfeiture Order*, 21 FCC Rcd at 4724, ¶ 38 ("we affirm the forfeiture calculation methodology for nonpayment of universal service contributions and reporting violations as set forth in the *Globcom NAL*. We again warn carriers that if the forfeiture methodology described herein is not adequate to deter violations of our USF and TRS rules, our statutory authority permits the imposition of much larger penalties and we will not hesitate to impose them."); *Globcom NAL*, 18 FCC Rcd at 19903, ¶¶ 25-26.

¹⁰² *Globcom Forfeiture Order*, 21 FCC Rcd at 4724, ¶ 37; *Globcom NAL*, 18 FCC Rcd at 19903, ¶ 26.

¹⁰³ *Globcom Forfeiture Order*, 21 FCC Rcd at 4723-24, ¶¶ 36-38; *Globcom NAL*, 18 FCC Rcd at 19903-04, ¶¶ 25-27.

¹⁰⁴ 47 U.S.C. § 214(a).

¹⁰⁵ 47 C.F.R. § 63.18.

¹⁰⁶ 47 U.S.C. § 214(a).

Commission's rules sets out the rules for providing U.S.-international service, including the requirement that a carrier seek and obtain Commission approval prior to providing international service.¹⁰⁷ The Commission has explained that the international section 214 review process serves several purposes.¹⁰⁸ It enables the Commission to review applications for risks to competition, particularly in situations where the applicant has an affiliation with a foreign carrier with market power on the foreign end of the route that may be able to leverage that market power to discriminate against U.S. competitors to the detriment of U.S. consumers.¹⁰⁹ The review process also includes consultation with the Executive Branch agencies regarding national security, law enforcement, foreign policy and trade concerns that may be unique to the provision of international service.¹¹⁰

37. For these reasons, section 63.18 of the Commission's rules therefore requires that "any party seeking authority pursuant to Section 214 . . . for the provision of common carrier communications services between the United States, its territories or possessions, and a foreign point shall request such authority by formal application."¹¹¹ Section 63.18(e)(2) clearly assigns the obligation to apply for and obtain section 214 authorization before providing international service to resellers by establishing specific requirements for parties "applying for authority to resell the international services of authorized U.S. common carriers subject to [section 63.23] of this part," which, in turn, identifies the conditions that apply to "carriers authorized to resell the international services of other authorized carriers."¹¹² The Commission has specifically stated that this requirement for prior approval to provide international service explicitly extends to wireless telecommunications carriers.¹¹³

38. Notwithstanding these explicit requirements, InPhonic provides international service, but apparently does not hold an authorization pursuant to section 214 from the Commission. In its annual Telecommunications Reporting Worksheets for 2003, 2004, and 2005, InPhonic reports international revenues for certain mobile and toll services.¹¹⁴ Yet the Commission's International Bureau's Filing System ("IBFS") database has no record that InPhonic or its subsidiaries have applied for or obtained

¹⁰⁷ 47 U.S.C. Part 63.

¹⁰⁸ See *1998 International Biennial Review Order*, 14 FCC Rcd at 4915-16, 4918, 4921, ¶¶ 16, 21, 27; *PCIA Forbearance Order*, 13 FCC Rcd at 16883, ¶¶ 50-51.

¹⁰⁹ See *1998 International Biennial Review Order*, 14 FCC Rcd at 4914-16, ¶¶ 14-16; *PCIA Forbearance Order*, 13 FCC Rcd at 16882-83, ¶ 50.

¹¹⁰ *1998 International Biennial Review Order*, 14 FCC Rcd at 4914-15, ¶ 14; *PCIA Forbearance Order*, 13 FCC Rcd at 16882, ¶ 50.

¹¹¹ 47 C.F.R. § 63.18.

¹¹² *Id.* § 63.18(e)(2).

¹¹³ *1998 International Biennial Review Order*, 14 FCC Rcd at 4926-27, ¶¶ 38-39 (the public interest concerns for requiring prior review of international section 214 applications apply equally to CMRS carriers); *PCIA Forbearance Order*, 13 FCC Rcd at 16881, ¶ 46 (all CMRS carriers are required to obtain an international section 214 authorization before providing international service). In 2004, the Commission sought comment on whether to reconsider the prior application requirement for certain wireless carriers, but to date it has not rescinded or modified that requirement. *Amendment of Parts 1 & 63 of the Commission's Rules*, Notice of Proposed Rulemaking, 19 FCC Rcd 4231, 4238-4241, ¶¶ 15-21 (2004).

¹¹⁴ See InPhonic LOI Response at Ex. H.

section 214 authorization.¹¹⁵ In addition, as discussed above, InPhonic admits that it does not hold “a license, permit, certificate or other authorization issued by the Commission.”¹¹⁶

39. The Commission has previously proposed forfeitures against telecommunications service providers failing to obtain section 214 authorization prior to providing service. In *Philippine Long Distance Telephone*,¹¹⁷ the Commission proposed forfeitures of \$200,000 each against World Communications, Inc. (“WorldCom”) and Manila Peninsula Hotel (“Peninsula”) for failing to obtain section 214 authority prior to providing international telecommunications service. The Commission found that the violations were egregious and continuing and applied upward adjustments of \$120,000 to the then-existing base forfeitures of \$80,000 to assess total forfeitures of \$200,000 each.¹¹⁸ In *Ameritech Corporation*,¹¹⁹ the Commission issued a \$200,000 forfeiture against Ameritech for constructing new communications facilities without first obtaining authorization from the Commission. The Commission found that the requirements of section 214, as indicated by the unambiguous language of the statute, should have been readily apparent to Ameritech.¹²⁰ The Commission also considered Ameritech’s ability to pay and found that the violation was continuing, and proposed a forfeiture of \$200,000.¹²¹

40. Both the *Philippine Long Distance Telephone* and the *Ameritech Corporation* decisions were released prior to the Commission’s current forfeiture guidelines.¹²² In 1993, when the Commission released *Philippine Long Distance Telephone*, the base forfeiture for a section 214 violation under the *1991 Forfeiture Guidelines* was \$80,000, *i.e.*, 80 percent of the maximum forfeiture under section 503 of the Act (\$100,000 in 1993).¹²³ The D.C. Circuit vacated the *1991 Forfeiture Guidelines* in 1994.¹²⁴ The Commission’s enforcement action in *Ameritech Corporation* was taken in 1995. In 1997, the Commission adopted the current forfeiture guidelines, which provide a base forfeiture amount of \$10,000 for operation without an instrument of authorization for the service.¹²⁵ Although the *Philippine Long*

¹¹⁵ See <http://svartifoss2.fcc.gov/myibfs/quickSearch.do?sortBy=callsign&ssid=960021005&pgid=2>.

¹¹⁶ InPhonic NAL Response at 17.

¹¹⁷ *Philippine Long Distance Tel. Co.*, Order & Notice of Apparent Liability for Forfeitures, 8 FCC Rcd 755 (1993).

¹¹⁸ *Id.* at ¶ 15. The forfeitures against WorldCom and Peninsula were later cancelled due to insufficient evidence. *Philippine Long Distance Tel. Co.*, Order, 13 FCC Rcd 21520 (1998), *aff’d*, Order on Recons., 16 FCC Rcd 16612 (2001).

¹¹⁹ *Ameritech Corp.*, Apparent Liability for Forfeiture, 10 FCC Rcd 10559 (1995).

¹²⁰ *Id.* at 10560, ¶ 9.

¹²¹ *Id.* Ameritech and the Commission subsequently entered into a Consent Decree to resolve the investigation and Ameritech made a \$150,000 voluntary contribution to the U.S. Treasury. *Ameritech Corp.*, Order, 11 FCC Rcd 15474 (1996).

¹²² The current forfeiture guidelines are set forth in the Commission’s 1997 *Forfeiture Policy Statement*, 12 FCC Rcd 17087. The forfeiture guidelines applicable from 1991-94 are set forth in *Standards for Assessing Forfeitures*, Policy Statement, 6 FCC Rcd 4695 (1991) (“*1991 Forfeiture Guidelines*”).

¹²³ *1991 Forfeiture Guidelines*, 6 FCC Rcd 4695, Appendix I. The *1991 Forfeiture Guidelines* provided for upward adjustments, which included an additional percentage of the maximum forfeiture permitted under section 503 of the Act, 47 U.S.C. § 503, as follows: egregious misconduct, 50-90 percent; ability to pay/relative disincentive, 50-90 percent; intentional violation, 50-90 percent; substantial harm, 40-70 percent; substantial economic gain, 20-50 percent; repeated or continuous violation, variable up to the statutory maximum per violation or per day of a continuing violation. *Id.* at Appendix II.

¹²⁴ *US Tel. Assoc. v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994).

¹²⁵ *Forfeiture Policy Statement*, 12 FCC Rcd 17087, Appendix A; 47 C.F.R. § 1.80.

Distance Telephone and the *Ameritech Corporation* decisions were issued before the Commission's adoption of the current forfeiture guidelines, these decisions provide guidance on the appropriate upward adjustment to the base forfeiture for a section 214(a) violation, when the Commission's upward adjustment factors are implicated.

41. InPhonic has apparently been operating as an international telecommunications service provider since 2002 without authorization from the Commission. We therefore find that this apparent violation of the Act and the Commission's rules was continuing. Given the unambiguous language of the Act,¹²⁶ the Commission's rules and decisions,¹²⁷ and even the Commission's web site,¹²⁸ it should have been apparent to InPhonic that it was required to obtain section 214 authority from the Commission to provide international telecommunications service. In light of the Commission's clear requirements, and the important public interest considerations involving national security, law enforcement, foreign policy and trade policy,¹²⁹ we find that InPhonic's failure to obtain section 214 authority from the Commission prior to providing international telecommunications service was also egregious. We view InPhonic's apparent failure to obtain section 214 authority as serious a dereliction of its responsibilities under the Act and our rules as its failure to register pursuant to section 64.1195(a) of the Commission's rules.¹³⁰ Just as a telecommunications carrier that fails to register can operate outside of the Commission's oversight and evade its federal obligations to contribute toward the vital programs linked to registration, international telecommunications carriers that fail to obtain section 214 authority may endanger important public interest considerations involving national security, law enforcement, foreign policy and trade policy. We also find that a proposed forfeiture must be large enough to have a deterrent effect on companies with gross revenues commensurate with those of InPhonic.¹³¹ Pursuant to the Commission's mandate from Congress to consider "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require,"¹³² we find, consistent with prior precedent for entities failing to receive prior authorization from the International Bureau, that a proposed forfeiture of \$100,000 is warranted for InPhonic's apparent willful and repeated failure to obtain section 214 authority from the Commission prior to providing international telecommunications service.¹³³

¹²⁶ 47 U.S.C. § 214(a).

¹²⁷ See, e.g., 47 C.F.R. §§ 63.12, 63.18, 63.20, 63.21, 63.23; *1998 International Biennial Review Order*, 14 FCC Rcd 4909; *Regulation of Int'l Common Carrier Services*, Report and Order, 7 FCC Rcd 7331 (1992) ("*International Resale Order*").

¹²⁸ For example, the Commission's website has a list of frequently asked questions about section 214 applications for providers of international telecommunications services. See <http://www.fcc.gov/ib/pd/pf/214guide.html>. Among the questions and answers are the following: "Question: If I am merely reselling the international services of another carrier, do I have to file a section 214 application? Answer: Yes, including in the case of mobile international services. Refer to 47 CFR § 63.18(e)(2), global resale service."

¹²⁹ See *1998 International Biennial Review Order*, 14 FCC Rcd at 4915-17, ¶¶ 15-18, 4939-40, ¶¶ 72-74.

¹³⁰ 47 C.F.R. § 64.1195(a).

¹³¹ See InPhonic LOI Response at Ex. H (submitting gross annual revenue on its 2003-05 Annual Worksheets).

¹³² 47 U.S.C. § 503(b)(2)(D).

¹³³ See, e.g., *DIRECTV*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 10939 (2004) (proposing a substantial forfeiture against a company that failed to obtain requisite international authorization from the Commission).

V. CONCLUSION

42. InPhonic operated as a provider of interstate and international telecommunications services for multiple years without registering with the Commission or making payments to Congressionally-mandated telecommunications programs, thereby denying these programs of essential funding for an extended period of time and totaling hundreds of thousands of dollars in withheld contributions. In light of the seriousness, duration and scope of the apparent violations, we find that the forfeiture proposed in the *InPhonic NAL* is warranted. As discussed above, this forfeiture amount includes as follows: (1) a total proposed penalty of \$100,000 for failing to register pursuant to section 64.1195 of the Commission's rules;¹³⁴ (2) a total proposed penalty of \$100,000 for failing to file two Telecommunications Reporting Worksheets within the year preceding issuance of the *InPhonic NAL*; (3) a total proposed penalty of \$598,626 for failing to make seven monthly universal service contributions within the year preceding issuance of the *InPhonic NAL*; and (3) a proposed total penalty of \$21,279 for failing to make its 2004 TRS Fund contribution when due.

43. Furthermore, in light of the seriousness, duration and scope of InPhonic's apparent violation concerning its failure to obtain Commission approval under section 214(a) to provide international telecommunications service, we find that an additional proposed forfeiture in the amount of \$100,000 is warranted. We direct InPhonic to submit within thirty days either as part of its response to this *Notice of Apparent Liability* or separately, a report supported by a sworn statement or declaration under penalty of perjury of a corporate officer, stating its plan to come into compliance with the relevant authorization rules described herein. InPhonic should also submit to the Commission within thirty days all authorization applications under section 214(a) to provide international telecommunications service. We again caution InPhonic that additional violations of the Act or the Commission's rules could subject InPhonic to further enforcement action. Such action could take the form of higher monetary forfeitures and/or possible revocation of InPhonic's operating authority, including disqualification of InPhonic's principals from the provision of any interstate common carrier services without the prior consent of the Commission.¹³⁵

VI. ORDERING CLAUSES

44. Accordingly, IT IS ORDERED THAT, pursuant to section 503(b) of the Communications Act of 1934, as amended,¹³⁶ and section 1.80 of the Commission's rules,¹³⁷ InPhonic, Inc. IS LIABLE FOR A MONETARY FORFEITURE in the amount of \$819,905 for willfully and repeatedly violating the Act and the Commission's rules.

45. Payment of the forfeiture shall be made in the manner provided for in section 1.80 of the Commission's rules within thirty days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹³⁸ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No.

¹³⁴ 47 C.F.R. § 64.1195.

¹³⁵ See *Business Options, Inc.*, Consent Decree, 19 FCC Rcd 2916 (2003); *NOS Communications, Inc., Affinity Network Inc. & NOSVA LP*, Consent Decree, 2003 WL 22439710 (2003).

¹³⁶ 47 U.S.C. § 503(b).

¹³⁷ 47 C.F.R. § 1.80.

¹³⁸ 47 U.S.C. § 504(a).

and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for payment of the full amount of the forfeiture under an installment plan should be sent to: Chief, Credit and Management Center, 445 12th Street, S.W., Washington, D.C.¹³⁹

46. IT IS FURTHER ORDERED THAT, pursuant to sections 4(i) and 214(a) of the Act,¹⁴⁰ and section 63.18 and 63.20 of the Commission's rules,¹⁴¹ within thirty days of the release of this FORFEITURE ORDER AND FURTHER NOTICE OF APPARENT LIABILITY FOR FORFEITURE, InPhonic SHALL SUBMIT to the Commission a report, supported by a sworn statement or declaration under penalty of perjury by a corporate officer, stating its plan to come into compliance with the authorization rules discussed herein, and its application for authority to provide international telecommunications service.

47. IT IS FURTHER ORDERED THAT, pursuant to section 503(b) of the Communications Act of 1934, as amended,¹⁴² and section 1.80 of the Commission's rules,¹⁴³ that InPhonic is hereby NOTIFIED of its FURTHER NOTICE OF APPARENT LIABILITY FOR A FORFEITURE in the amount of \$100,000 for willfully and repeatedly violating the Act and the Commission's rules.

48. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission's Rules,¹⁴⁴ within thirty days of the release date of this FURTHER NOTICE OF APPARENT LIABILITY, InPhonic SHALL PAY the full amount of the further proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the further proposed forfeiture. Payment of the further proposed forfeiture must be made by check or similar instrument, as set forth above.

49. The response, if any, to this FURTHER NOTICE OF APPARENT LIABILITY must be mailed to Hillary DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, Room 4-C330, 445 12th Street, S.W., Washington, D.C. 20554 and must include the NAL/Acct. No. referenced above.

50. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

¹³⁹ See 47 C.F.R. § 1.1914.

¹⁴⁰ 47 U.S.C. §§ 154(i), 214(a).

¹⁴¹ 47 C.F.R. §§ 63.18, 63.20.

¹⁴² 47 U.S.C. § 503(b).

¹⁴³ 47 C.F.R. § 1.80.

¹⁴⁴ See 47 C.F.R. § 1.80(f)(3).

51. IT IS FURTHER ORDERED that copies of this ORDER OF FORFEITURE AND FURTHER NOTICE OF APPARENT LIABILITY shall be sent by certified mail, return receipt requested, to Aaron Daniels, Senior Vice-President and Corporate Treasurer, InPhonic, Inc., 1010 Wisconsin Avenue, N.W., Suite 600, Washington, D.C. 20007, and to Dana Frix, Chadbourne and Parke, LLP, 1200 New Hampshire Avenue, NW, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary